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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No._____

SVEN ANTONIOUS STEFFNER,

Petitioner,

— vs. —

JOSEPH SAVORETTI, District Director of Immigration and Naturalization,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To Honorable Fred M. Vinson, Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Sven Antonious Steffner, respectfully represents unto this court:

I

SUMMARY STATEMENT

On November 22, 1949, the appellant filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida, Miami Division, alleging that he was at liberty on bail in the amount of Five Hundred ($500.00) Dollars, which bail was granted him by the appellee, Joseph Savoretti, District Director of Immigration and Naturalization, however, that on November 23, 1949, the appellee would imprison, confine and detain the appellant in a jail or other place of confinement at Miami, Florida, and thereafter deport him to the country of his birth, viz: Sweden, pursuant to a warrant of deportation issued on August 26, 1949, by W. F. Kelly, Assistant Commissioner, Enforcement Division. The appellant alleged in said petition that the eminent confinement of his person by the appellee, and the eminent deportation of the appellant by the appellee, to Sweden, would be illegal and contrary to law and the appellant set forth in said petition, the following facts:

That the appellant arrived at the Port of New York on May 30, 1920, as a passenger on board the "S. S. Stockholm" and was duly and legally admitted in the United States as a permanent resident thereof. That following his entry in the United States, in 1920, the appellant married, lived in the United States and as a result of said marriage, three children were born, all natural-born citizens of the United States, who have now reached their majority. That in 1936, the District Director of Immigration and Naturalization at San Francisco, California, charged the appellant with a violation of law, 8 U.S.C.A. 155(a), in that the appellant was an alien who was a member of

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an organization, association, society or group that believes in the overthrow, by force or violence, of the Government of the United States. The appellant's petition in the lower court alleged that he was given a hearing (see original papers part of record of this case) in San Francisco, California, by the District Director of Immigration and Naturalization and that, as a result of said hearing, it was found and determined that the appellant was a member of an organization, association, society or group as characterized above and therefore the appellant was deported to Sweden in 1936.

The petition in the lower court also alleged, and it is here admitted, that the appellant, prior to his deportation in 1936, violated certain laws of the United States, the State of California, and the State of Illinois, to-wit: theft and transportation of a motor vehicle and petit theft, for which violations the appellant was tried and convicted but received sentences of less than one year imprisonment.

The appellant also alleged in said petition that on September 26, 1945, he re-entered the United States at the Port of Boston, Massachusetts, as a crew member on board the Swedish liner "Krageholm" and thereupon deserted said ship and remained in the United States without being in possession of a valid immigration visa and without having secured permission from the Attorney General, to apply for re-admission to the United States, after having been deported to Sweden in 1936.

Said petition further alleged that the appellant voluntarily appeared before the United States Immigration authorities at Miami, Florida, in June 1947, for the purpose of stating his past history to said authorities and

adjusting his status in the United States — this resulted in his having been given a hearing by the appellee on June 20, 1947, and on July 23, 1947 (see Tr. Pages 14 and 15) which hearing resulted in the issuance of the warrant of deportation specified above, that is, issued on August 26, 1949, by W. F. Kelly, Assistant Commissioner, Enforcement Division, (see Tr. Pages 10 and 12) wherein and whereby it was concluded that the appellant is subject to deportation in that he is an alien who admits having committed a felony or other crime involving moral turpitude prior to his entry in the United States and further, that the appellant is an alien who had been arrested and deported in pursuance of law and to whom proper authority had not been given to re-apply for permission to re-enter the United States and further, that the appellant is an alien who at the time of his entry into the United States, was no in possession of a valid visa and not exempted from the presentation thereof.

The appellant also filed an affidavit in the lower court (see Tr. Pages 16 and 17) wherein he averred that during World War II, he was a member of the United States Merchant Marine and et cetera.

In said petition, the appellant prayed that an order be entered enjoining the appellee from incarcerating the appellant and deporting him for the reasons therein stated, however, the larned judge denied said petition on the ground that the appellant, prior to his entry in the United States, in 1945, was convicted of a felony involving moral turpitude.

In view of the District Court's full denial of the relief prayed for in said petition for writ of habeas corpus, an

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appeal was taken to the United States Court of Appeals for the Fifth Circuit. The appellant's contention having been, and still being, that the record of the deportation hearing given the appellant at San Francisco, California, conclusively shows that if the appellant was a member of an organization, association, group or society that believes in the overthrow, by force or violence, of the Government of the United States, he was such a member for only a short period of time during the year 1933 and that he was not a member of such an organization at the time of his arrest and deportation in 1936; and that therefore there was a serious misapplication of law in ordering his deportation in 1936. The appellant also contended that the hearing given him at Miami, Florida, in June 1947, was not in accordance with the Administrative Procedure Act 5 U.S.C.A. 1001-1011 inclusive, and the Court of Appeals resolved this contention in the appellant's favor in view of the recent decision of the Supreme Court of the United States in the case of Wong Yang Sung vs. J. Howard McGrath, et al, Case No. 154, October Term, 1949. 70 S. Ct. 445.

II

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 1254 (1) of the Judicial Code, Title 28, United States Code, Section 1254 (1), Pub. L. No. 773, 80th Cong. 2d Sess., 1254 (1), June 25, 1948.

The judgment of the Court of Appeals sought to be reviewed was rendered on June 21, 1950, (Case No. 13,098). A petition for rehearing was not filed in said Appellate Court.

III

QUESTIONS PRESENTED

The sole question presented is whether or not the order of deportation entered against the appellant in 1936 was illegal and should therefore be set aside and declared null and void ab initio. If this question is answered in the affirmative, then the appellant is not now subject to deportation by reason of his having violated certain laws of the United States because he received sentences of less than one year imprisonment nor is he deportable bcause of having reentered the United States in 1945 without permission from the Attorney General and without a valid immigration visa because his right to residence would date back to his original entry on May 30, 1920, when he was legally admitted as a permanent resident of the United States.

IV

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The reason relied on for the allowance of a writ of certiorari is that the Court of Appeals for the Fifth Circuit failed to follow previous decisions of this Court to the effect that when an error of law is committed, or when there is a misapplication of law by the Department which issues the order of deportation, such order will be reviewed by the Courts and set aside.

V

PRAYER FOR WRIT

A certified transcript of record of this case in the Court of Appeals for the Fifth Circuit is submitted here-

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with together with the "original papers" from the files of the Department of Justice which also form a part of the record in this case and the same is made a part hereof in compliance with Rule 38 of this Court.

WHEREFORE, the petitioner prays that a writ of certiorari issue by direction and under the seal of this Court directed to the United States Court of Appeals for the Fifth Circuit to the extent that this cause may be completely reviewed by this court and the errors of the lower Court revised and corrected and, thereafter, that further proceedings be ordered herein as may be provided by existing Federal law.

LOUIS A. SABATINO,

Attorney for Petitioner,
923 duPont Building,
Miami, Florida.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No._____

SVEN ANTONIOUS STEFFNER,

Petitioner,

— vs. —

JOSEPH SAVORETTI, District Director of Immigration and Naturalization,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

THE OPINION OF THE COURT BELOW

The opinion of the Court of Appeals, rendered June 21, 1950 (Case No. 13,098), has not yet appeared in the Federal Reporter.

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II

JURISDICTION

The jurisdiction of this Court is invoked under 1254 (1) of the Judicial Code, Title 28, United States Code, Section 1254 (1), Pub. L. No. 773, 80th Cong. 2d Sess., 1254 (1), June 25, 1948.

III

STATEMENT OF THE CASE

The nature of the case and the decision of the Court of Appeals for the Fifth Circuit are set forth in the foregoing petition which, in the interest of brevity, is adopted as a part of this brief.

IV

SPECIFICATION OF ERROR

The appellant submits that the error committed by the Court of Appeals for the Fifth Circuit consists of having refused to set aside and declare void ab initio, the order of deportation entered against the appellant in 1936 notwithstanding that said order of deportation was based on a misapplication of law.

The misapplication of law which the appellant contends was committed by the Secretary of Labor (the authority who had jurisdiction over immigration matters at that time) consists of:

(a) the fact that at the time of the appellant's arrest at San Francisco, California, and there charged with being a member of an organization, association, group or society that believes in the overthrow by force or violence of the Government of the United States, the appellant in fact was not a member of the Communist Party and if ever he had been such a member, it was in 1933 for but a few months, and,

(b) further, if the appellant ever became a member of the Communist Party (for the brief period shown in the "original papers" that form part of the record), he was never convinced of its principles and teachings and consequently never brought about in himself a state of mental attitude that could then, or could now, be considered a threat or a possible threat to the security of the United States.

V

ARGUMENT IN SUPPORT OF PETITION

First and foremost, the writer respectfully represents unto this Honorable Court that he has thoroughly studied this case and that it is his considered judgment that the appellant is not, nor has he ever been, a Communist in the true sense of the word nor has the appellant ever been a person whose mental attitude is, or ever has been, adverse to our form of government, much less believe in the overthrow thereof by force, violence or otherwise. Were the writer not firmly convinced, as above stated, he would not have assisted, nor would he now, assist the appellant in his effort to avoid deportation.

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Much can be said of the appellant's reformation after his convictions of larceny and transportation of a stolen automobile from Iowa to California. Much may be said of his admiration for our Government when he served in the United States Merchant Marines during World War II as disclosed by the appellant's affidavit which has not been attacked by the appellee (Tr. 16-17), however, the appellant's appeal to this Court's discretion to review the decision of the Court of Appeals is not based on a plea for sympathy but because of errors committed below.

It seems to be uncontroverted that if the appellant's order of deportation in 1936 is declared void ab initio, then the appellant is not now deportable by reason of his having reentered the United States in 1945 without special permission from the Attorney General (as required by law of a once deported alien) nor is the appellant now deportable by reason of his having reentered the United States in 1945 without an immigration visa because his right to residence in the United States would date back to his original legal entry in 1920 when he was legally and duly admitted; further, the appellant could not now be deported by reason of the violations of law committed by him in 1945 because he received sentences, all of which collectively and individually, amounted to less than one year (an alien must receive a sentence of more than one year to be deported for crimes involving moral turpitude after entry in the United States, 8 U.S.C.A. 155 (a)).

The law as it existed at the time the appellant was charged with being a member of an organization denounced by statute (8 U.S.C.A. 155 (a) has been interpreted by this Court in 1939 (three years after the appellant's deportation in the Case of Kessler v. Strecker, 307

U.S. 22) as meaning that the membership in an organization denounced by statute must have existed at the time of the alien's arrest—it is uncontroverted that the appellant was not a member of such an organization at the time of his arrest, at the time he was given a hearing, or at the time he was actually deported.

The appellee has contended in the Court of Appeals, and that Court has agreed with the appellee, that at the time deportation proceedings were instituted against the appellant in 1936, the prevailing interpretation on the statute in question (8 U.S.C.A. 155 (a) was announced in the Case of U.S. ex rel, Yokinen v. Commissioner, 57 F. 2d. 707. But that case involved facts entirely different from the case of the appellant. Yokinen in fact was a full-fledged Communist in the strict sense of the word at the time of his arrest even though he had been expelled from the Communist Party. He did not voluntarily leave it, his expulsion was due to his having been anti-negro, whether Yokinen was a member of the Party or not, he remained a Communist at heart even after his expulsion.

The Court of Appeals in its decision of the appellant's case stated among other things, (Tr. 28):

> ". . . Where an alien has been deported from the United States pursuant to a warrant of deportation, we do not think it permissible to allow a collateral attack on the previous deportation order in a subsequent deportation proceeding, unless we are convinced that there was a gross miscarriage of justice in the former proceedings. . . . "

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It is now submitted that there can be no greater miscarriage of justice than to misapply the existing law to the detriment of the person against whom proceedings are instituted; and this occurred when the Secretary of Labor failed to follow the decision of U.S. ex rel, Kettunen v. Reimer, decided by the Circuit Court of Appeals, Second Circuit, August 5, 1935, 79 F. 2d. 315. The Kettunen Case was decided at least one year prior to the appellant's deportation in 1936, while the Yokinen Case, which the Court of Appeals has hailed as the existing law at the time proceedings were instituted against the appellant, was decided in 1933, approximately three years prior to the appellant's deportation.

It is true that the Yokinen Case and the Kettunen Case were both decided by courts of equal dignity and, consequently, each might well be given the same weight, however, the basic reasoning and logic in each of these cases appears to be, the commanding of a deportation of a person whose mental attitude, feeling and belief is that of a true Communist. As stated above, Yokinen was ordered deported by the Court of Appeals that decided his case because his expulsion from the Party did not obliterate the fact that he was still a Communist at heart — there is nothing in the opinion to indicate that Yokinen was no longer a Communist after such expulsion. In the Kettunen Case, the alien was not deported because, as in the case of the appellant, Kettunen attended meetings of the Communist Party and then quit the Party entirely. To this situation and in spite of the fact that Kettunen, at the immigration hearing given him, refused to state whether or not he believed in the overthrow of our Government by force or violence, the Court vacated the order of deportation against him and said:

". . . In deciding this case, we shall not attempt to give a comprehensive definition of the word 'affiliation' as used in the statute. Very likely that is as impossible as it is now unnecessary. It is enough for present purposes to hold that it is not proved unless the alien is shown to have so conducted himself that he has brought about a status of mutual recognition that he may be relied on to co-operate with the Communist Party on a fairly permanent basis. He must be more than merely in sympathy with its aims or even willing to aid it in a casual intermittent way. . . . "

The original papers which form a part of the record of this case and which include a transcript of the hearing given the appellant at San Francisco, California clearly shows that the appellant attended meetings of the Communist Party at the instigation of a fellow worker and it also clearly shows that the appellant did not attend meetings of the Party after realizing the principles for which the Party stood (appellant's alleged membership was for approximately three months). Certainly a person who, not knowing and not realizing the principles for which an organization stands, attends meetings of such an organization or becomes a member thereof, but upon learning and realizing its principles, divorces himself from such an organization, should not be condemned but praised, it is submitted that tolerance in cases as that of the appellant are highly deserving of commendation especially in these troubled times when Communism threatens the very peace and tranquility of the world. If all those who believe that Communism is a great thing would of their own initiative decide that it is a curse rather than anything else, an

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overwhelming majority of the troubles of our nation would suddenly cease.

One of the main contentions of the appellee has been that since the appellant was actually deported in 1936, he cannot now seek a review of the order of deportation. The Court of Appeals stated in its opinion that the appellant had his day before the immigration authorities and that he failed to test the validity of the order, thus leaving us to conclude that his failure to contest the deportation order in 1936 precludes a review thereof at this time, yet, as stated above, the Court of Appeals admitted that such a deportation order would be reviewed in a subsequent deportation proceedings upon the Court being convinced that a gross miscarriage of justice was committed in the former proceedings. The appellant respectfully submits that the order of deportation of 1936 was based on a gross miscarriage of justice in that the law then prevailing was not applied.

After this Court interpreted the statute (as it previously existed) concerning membership in a prescribed organization (8 U.S.C.A. 137 (g)) by its decision in the Case of Kessler v. Strecker, supra, Congress modified the statute to the extent that it now includes, "present or past membership."

It is conceded that the appellant may now be re-arrested and re-charged with membership in the Communist Party, however, whether or not the Attorney General would now decide that the appellant was in fact a member of that Party in 1933, with intention of being an active Communist, remains to be seen, and, in this connection the writer submits that proof of the appellant's active membership in the Communist Party in 1933 is highly improbable, in fact the appellant can prove just the opposite.

Respectfully submitted,

LOUIS A. SABATINO,
Attorney for Appellant,
923 duPont Building,
Miami, Florida.

I, Sven Antonious Steffner, the petitioner herein, hereby certify that I have read the foregoing petition and supporting brief and that the statements therein contained concerning my connection with the Communist Party at San Francisco, California, in 1933 are true and correct.

SVEN ANTONIOUS STEFFNER.

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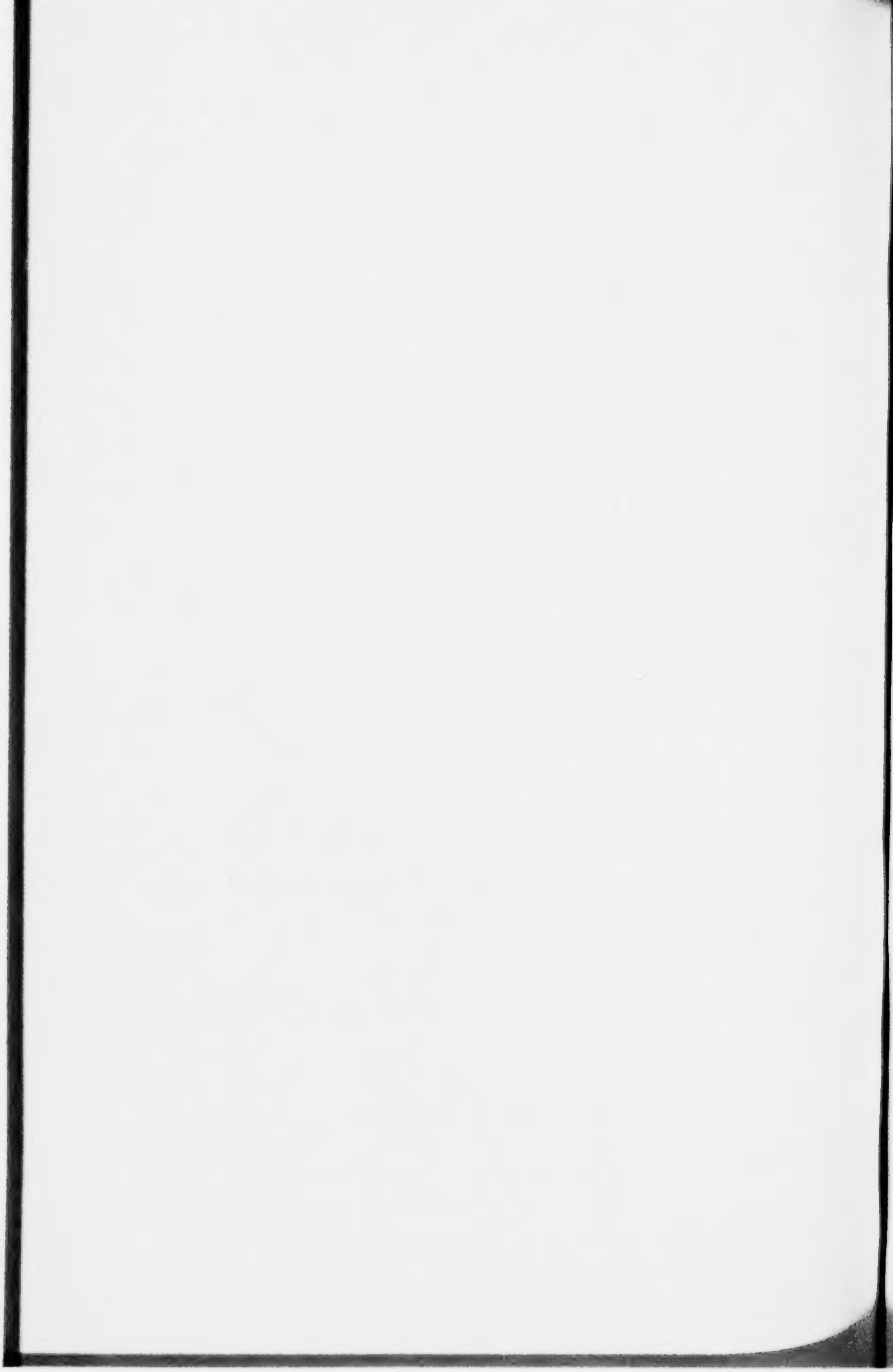

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 237

SVEN ANTONIOUS STEFFNER, PETITIONER

v.

JOSEPH SAVORETTI, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In 1936, petitioner, a native of Sweden and a resident of the United States since 1920, was ordered deported after a hearing in California in which it was found that subsequent to his entry into the United States he had become a member of the Communist Party (R. 2, 15), and therefore should be deported in accordance with the then existing law. Section 2, Act of October 16, 1918, c. 186, 40 Stat. 1012.[1] He did not contest the

[1] At that time, Section 2 provided for the deportation of any alien who "at any time" after entry was found to have become a member of any organization or group that believed in, advised, advocated or taught the overthrow by force or violence of the Government of the United States.

validity of the order for his deportation (see R. 27) and he was deported on December 19, 1936 (R. 2). Prior thereto, in the early thirties, he had been convicted of petit theft, larceny, and transportation of a stolen automobile in interstate commerce (R. 6, 11).

In September 1945, petitioner arrived at Boston, Massachusetts, as a member of the crew of a Swedish ship. He was admitted as a seaman but deserted his ship and remained in the United States, although he did not have an immigration visa or any type of authority permitting his entry into this country as a permanent resident. After his entry he married his second wife, with whom he is living in Miami, Florida, where he works as a carpenter. After this marriage, in an effort to clarify his status, he voluntarily appeared before the United States Immigration authorities and thereafter filed a petition for suspension of deportation under 8 U. S. C. 155 (c), on the ground that deportation would result in economic detriment to his wife, an American citizen. (R. 4–5.) After a hearing held, before an immigration inspector at Miami, Florida, in 1947, at which petitioner appeared and was represented by counsel (R. 5, 14–15), an order for his deportation, dated August 26, 1949, was issued on the grounds (1) that he admitted having committed crimes involving moral turpitude prior to his 1945 entry into the United States, (2) that he was convicted of such crimes, (3) that at the time

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of entry he was not in possession of a valid immigration visa and not exempted from the presentation thereof, and (4) that he was an alien who had been deported and to whom the proper authority for readmission had not been granted (R. 11–12). During the course of the administrative proceeding, petitioner was at liberty under $500 bond (R. 6).

On November 22, 1949, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida challenging the validity of the order for his deportation (R. 1–9). He alleged that he was then at liberty on the bond posted in the deportation proceeding but expected to be imprisoned on November 23, 1949 (R. 1, 6). He claimed that the 1936 deportation order was invalid because, although he had been a member of the Communist Party in 1933, he was not a member in 1936 at the time those proceedings were instituted against him, and that under this Court's subsequent decision in *Kessler* v. *Strecker,* 307 U. S. 22 (1939), an alien who was not a member of a proscribed organization at the time of the institution of deportation proceedings was not deportable (R. 2–4).[2] Accordingly, he alleged, the third and fourth grounds upon which the 1949

[2] In the Alien Registration Act of 1940, c. 439, Title II, 54 Stat. 673, 8 U. S. C. 137, Congress amended the 1918 statute so as to make past membership a ground for deportation.

deportation order was based, i. e., that he entered the United States without proper authority, must fall (R. 2–3). Based upon the same hypothesis that his deportation in 1936 was illegal, with the result that he made no "entry" in 1945, but only in 1920, he also alleged that since the maximum sentence imposed upon him for his crimes was nine months' imprisonment, the 1949 order could not be sustained under the provisions of 8 U. S. C. 155 (a), which deal with deportation of aliens convicted of crimes committed after entry, or under the provision of the same section dealing with aliens who were convicted or admit the commission of crimes prior to entry (R. 6–7).[3] Finally, he alleged that the hearing before the immigration inspector did not meet the requirements of the Administrative Procedure Act (R. 5).

On November 22, 1949, the same date the petition was filed, the court issued an order to show cause, returnable at 9:00 a. m. on November 23

[3] The relevant portions of Section 155 (a) provide for the deportation of "* * * any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * *" and of "* * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; * * *."

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(R. 9–10). In his return to the order to show cause, filed on November 23 (R. 10–13), the District Director of the Immigration and Naturalization Service alleged that petitioner was at liberty under a bond conditioned upon his delivery into the custody of an officer of the Service for deportation under a warrant of deportation and that the surety on the bond had been requested to deliver petitioner to the Service at 2:00 p. m. on November 23 for the purpose of deporting him pursuant to the order of August 26, 1949 (R. 12). The order was set forth in the return and it was prayed that the petition be dismissed so that the order could be executed.

On December 5, 1949, the District Court dismissed the petition, holding that petitioner was deportable in that he was convicted prior to his 1945 entry of a felony involving moral turpitude and that it was unnecessary to consider the other grounds for deportation (R. 17–18). The court enlarged petitioner "on bail" pending appeal (R. 18).

On appeal, the Government conceded that the hearing was not conducted in accordance with the Administrative Procedure Act and petitioner conceded that if his deportation in 1936 was valid, he is deportable (R. 27–28). The Court of Appeals decided that the 1936 deportation order was not subject to collateral attack in the present proceeding and that, in any event, the order was valid when entered. However, in accordance with this

Court's intervening decision in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, the judgment of the District Court was reversed and petitioner was remanded "to the custody of the Director of Immigration and Naturalization at Miami, Florida, for the resumption of deportation proceedings in accordance with the requirements of the Federal Administrative Procedure Act" (R. 30). Petitioner now seeks review of the Court of Appeals' decision sustaining the validity of the 1936 deportation order.

While we agree with the Court of Appeals that the 1936 order, which petitioner did not challenge, cannot now be challenged in this proceeding (cf., in addition to the cases cited by the court below, R. 28, *Sunal* v. *Large,* 332 U. S. 174, and *Warring* v. *Colpoys,* 122 F. 2d 642 (C. A. D. C.), certiorari denied, 314 U. S. 678) and that the order was valid when entered, we think it is unnecessary further to discuss these issues in the present posture of this case.

The Court of Appeals' judgment is interlocutory in nature and not a final judgment, since it did not dispose of the whole case. Cf. *Republic Gas Co.* v. *Oklahoma,* 334 U. S. 62, 72; *Collins* v. *Miller,* 252 U. S. 364, 370. While it is true that this Court has power to grant certiorari to review interlocutory as well as final decrees of a court of appeals, *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 418, this power is exercised only in "extraordinary cases," and the fact that the de-

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cree sought to be reviewed is not final may, of itself, furnish sufficient ground for denial of the application. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U. S. 251, 258. Clearly, there are here no extraordinary circumstances or matters of urgent public interest such as to justify an exception to the general rule. The judgment of the Court of Appeals requires a new hearing and the making of a new record. It cannot be said with certainty that the result will be the same. "* * * the fate of the whole litigation may well be affected by the fate of the unresolved contingencies of the litigation" (*Republic Gas Co.* v. *Oklahoma, supra,* at 71), e. g., the possibility of suspension of deportation.

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
FELICIA H. DUBROVSKY,
Attorneys.

SEPTEMBER 1950.

U. S. GOVERNMENT PRINTING OFFICE: 1950